IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.74 OF 1994

The State of Maharashtra Appellant

Vs.

1) Ganpat Rama Pedanekar
2) Bhaskar Shantaram Vadyekar
3) Anand Pandurang Pedanekar
4) Ravindra Pandurang Pedanekar
5) Sadashiv Raoji Pedanekar
6) Vinayak Shantaram Vadyekar
7) Chandrakant Shantaram Vadyekar
8) Gopal Ramchandra Kavathakar
Nos.1,2 & 6 to 8 R/o Kavathi,
Taluka Kudal, Dist.Sindhudurg.
Nos.3 to 5 R/o Chendwan,
Taluka Kudad, Dist.
Sindhudurg. Respondents
(Org.Accd.Nos.1 to 8)

Mr. R.Y. Mirza, APP for Appellant-State.
Mr. N.V. Walawalkar for Respondent Nos.1 to 4 & 6 to 8.
Mr. S.R. Chitnis for Respondent No.5.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : September 20 & 21, 2004.

ORAL JUDGMENT (Per S.S. Parkar,J.):

1. This appeal is filed by the State against the Judgment and Order dated 24/9/1993 delivered by Assistant Sessions Judge, Sawantwadi, Sindhudurg acquitting the respondents-accused of offences under Sections 147, 148, 324, 307 read with Section 149 of IPC in Sessions Case No. 5 of 1992.

2. The prosecution case briefly states is as

follows:-

. The incident of assault had taken place on 29/12/1990 near the house of respondent no.1 - original accused no.1 in village Chendwan, Taluka Kudal, District Sindhudurg. The complainant PW 2 and his companions are the residents of village Kavathi in the same Taluka. In the afternoon they had gone for hunting. At about 6 p.m. they were returning to their village. As it was the month of December and it was dark they wanted to get back home soon and, therefore, wanted to take shortcut. While they were passing from the house of accused no.1, the complainant and his companions saw accused no.1 standing near his house. Accused no.1 started abusing Ganpat Poyrekar, one of the injured persons and objected to their passing from Bhatwadi near his house. At that time accused no.1 attacked Ganpat Poyrekar, since deceased, with a sickle on the rear side of his neck and on his legs, as a result of which Ganpat Poyrekar fell down. Then accused no.2 who was also having sickle in his hand came out from the house of accused no.1 and gave blow with a sickle on the forehead of complainant Tukaram. Thereafter the other accused i.e. respondent nos.3 to 8 also came armed with sticks and assaulted the complainant and Ganpat

Poyrekar. Complainant Tukaram had sustained injury on his shoulder. As both the injured had fallen down due to the assault on them, the complainant and Ganpat Poyrekar were lifted by the accused and kept in the courtyard of the house of accused no.1 along with their other two companions. When the injured witnesses demanded water, accused no.1 passed urine into the mouth of Ganpat Poyrekar. The accused did not allow the complainant and his three companions to leave the place till the police came. The accused themselves had sent two persons to call the police. After the police came on the scene, injured were taken to the police station and their statements were recorded and thereafter they were sent for medical treatment. The statement of PW 2 Tukaram was treated as FIR which is Exh.27, on the basis of which crime was registered against the accused persons and investigation had commenced. Spot panchanama Exh.22 was drawn by PSI Sawant PW 7 in the presence of panchas. The search of the house of accused no.1 was taken and two blood stained sickles which are Article Nos.7 and 8 were attached under panchanama Exh.23. The clothes of the complainant were also attached under panchanama Exh.24. The statements of the witnesses were recorded. On 30/12/1990 five accused were arrested and on the next date i.e. on 31/12/1990

remaining accused were arrested. One of the injured persons i.e. Ganpat Poyrekar was referred to Panjim Hospital as he had suffered fracture. His statement was recorded in that hospital. The blood samples of both the injured were collected. The blood stained clothes of Ganpat Poyrekar were attached under panchanama Exh.25. All the articles having blood stains, including the clothes of the injured persons, two sickles and the earth collected from the place of incident, were sent to C.A. for examination, in respect of which C.A. report Exh. 17 has been produced on record. After completion of the investigation charge-sheet came to be filed and the case was committed to the Sessions Court.

3. The Sessions Court framed charges against all the eight accused persons for offences under Sections 147, 148, 324 and 307 read with Section 149 of IPC, to which the respondents-accused pleaded not guilty. On behalf of the prosecution seven witnesses were examined, including PWs 2 to 5 as eye witnesses to the incident, one of whom i.e. PW 2 Tukaram Kavathkar is injured eye witness who had lodged complaint. PW 1 is Ramesh Kavathkar, who was panch to the spot panchanama and recovery of two blood stained sickles from the house of accused no.1. PW 6 is Dr. Lona Mohapatra

who had examined the complainant and the other injured i.e. Ganpat Poyrekar on the night of the incident. Lastly PW 7 is PSI Sudhakar Sawant who had investigated the case. The defence of the accused, as emerging from the 313 statements of accused nos.1 and 8, is that complainant and his companions along with other five persons had been to the house of accused no.1 to liquidate him. They were armed with guns and sickles. In the course of scuffle between the companions of complainant and the associates of accused no.1, the complainant and Ganpat Poyrekar received injuries. Thereafter scuffle stopped. Two persons from the side of accused no.1 had gone to police station to inform the police about the incident. In other words, the defence was of right of private defence of person.

4. After considering the entire evidence on record, the learned Assistant Sessions Judge, Sawantwadi delivered impugned judgment and order dated 24/9/1993 acquitting all the respondents-accused of all the offences with which they were charged on the ground that there is suppression on the part of the prosecution about the statements given to the police by the two persons belonging to accused side and, therefore, benefit was given to the

respondents-accused, as according to the trial court the origin of the incident was not brought to light.

5. We have been taken through the evidence of all the witnesses by the learned APP and we have heard both the sides at length. On behalf of the prosecution, it is contended that there is evidence of four eye witnesses, including one injured eye witness as regards the incident in question and, therefore, the order of acquittal was absolutely unwarranted and is inconsistent with the evidence on record, particularly when there was no injury on the person of any of the accused persons. On the other hand the learned defence counsel contended that this is an appeal against the order of acquittal and, therefore, this court may not interfere unless the impugned order is perverse. It was submitted that the view taken by the trial court is a possible view in view of the suppression of the statements of Anil Khadekar and Vilas Pednekar who were sent to call the police by accused no.1.

6. PW 2 Tukaram Kavathkar has deposed that he along with his four companions had gone for hunting in the forest near Mauli Mandir in village Chendwan along with four dogs. He had one stick with him. At about

6 p.m. while they were on a path way, near Bhatwadi in village Chendwan, they met Ganpat Raoji Poyrekar i.e. the other injured person who was returning to his house. Complainant asked him to show them shortcut to return to their village. They were following Ganpat. When they were passing from near the house of accused no.1, he abused Ganpat Poyrekar and questioned him whether there was no other path way for them. Injured Ganpat Poyrekar told accused no.1 that he was showing shortcut to the complainant and his companions. Accused no.1 suddenly attacked Ganpat Poyrekar with a sickle on rear side of his neck and on his legs, as a result of which Ganpat Poyrekar fell down. Then accused no.2 came out of the house of accused no.1 and assaulted complainant Tukaram on his head with a sickle. Complainant Tukaram also fell down. Thereafter accused nos.3 to 8 came from the house of accused no.1 and assaulted the complainant and his companions with the sticks. Thereafter complainant and injured Ganpat Poyrekar were lifted by the accused and taken in the courtyard of the house of accused no.1. When they asked for water for drinking, accused no.1 passed urine into mouth of Ganpat Poyrekar. All the accused, who were having sticks in their hands, surrounded them. They said that they had sent for police. Thereafter police came on the scene

who took the injured and the eye witnesses to Kudal Police Station. Injured were treated by Medical Officer, Kudal and the complaint of PW 2 Tukaram was recorded which is Exh.27. The evidence of complainant PW 2 is corroborated in essential particulars by his complaint Exh.27 and also by the evidence of PWs 3,4 and 5 who are also eye witnesses to the incident as they were accompanying the injured complainant.

7. The evidence of these witnesses is also corroborated by PW 6 Dr. Lona Mohapatra, who had examined complainant and injured Ganpat Poyrekar on the same night. According to her evidence PW 2 Tukaram Kavatkar had received incised wound on skull in the right parietal region, superficial 1 skin deep 1/2" x 1/4". He was treated and discharged on the same day. The other injured i.e. Ganpat Raoji Poyrekar had received following injuries on his person:-

(1) C.L.W. on left side of neck extending from posterial trangle on left side of neck, measuring 3" x 1/2" it was horizontal cut wound, there was blood oozing from the wound. Spine of cervical vertebra was visible.

(2) C.L.W. front of the thigh on left side measuring 5 & 1/2 x 1/2".

(3) C.L.W. right calf muscle 4 cm. x 1 cm.

(4) Palpalable fracture left femur sharp.

According to the doctor, the age of injuries on both the persons was within 6 to 12 hours and they could be caused by sharp object. He has deposed that injury no.4 noticed on the person of Ganpat Poyrekar was grievous injury, if confirmed. She has proved the medical certificates Exhs.40 and 41 in respect of PW 2 Tukaram Kavatkar and Ganpat Poyrekar respectively. According to her the injuries found on the persons of the injured could be caused by sickles, Article Nos.7 and 8. Thus the medical evidence also supports the evidence of eye witnesses that injured persons were assaulted with weapons like sickles, Article Nos.7 and 8. That these two injured persons had received injuries at the time of the incident is not even disputed by and/or on behalf of the accused persons. Their defence is that those injuries were suffered by them during the scuffle between the two groups when the companions of accused no.1 were trying to snatch away the sickles, Articles 7 and 8 from the hands of the witnesses.

8. The main ground on which respondents-accused have been acquitted by the trial court is that the prosecution had suppressed the statements of two persons i.e. Anil Khadekar and Vilas Pednekar who had

gone to call the police. Neither their statements were recorded at that time, nor their statements recorded subsequently were produced on record. As per the evidence of PSI Sawant PW 7 he had not annexed their statements to the charge-sheet nor they were examined in the court. According to the defence and the trial court the statements of those two witnesses would have thrown light as to who were the aggressors, whether they were the complainant and his companions or the accused themselves. No doubt PSI Sawant PW 7 has stated that he had not included the statements of Anil Khadekar and Vilas Pednekar in the charge-sheet but he has given the reason for not doing so by stating that he did not feel it necessary as there was other evidence on record. The prosecution witnesses have undoubtedly deposed that accused were not allowing the witnesses, including injured witnesses to go away from the courtyard of the house of accused no.1 on the ground that police were summoned by the accused. But it is not the case of the accused that they had told the constable who had come to the place of incident as to how the witnesses came to be injured and whether it was the complainant and his companions who had attacked the accused first.

9. Significantly, there is no material on record to

draw any inference that the complainant and his companions must be the aggressors. If the complainant's side was having the strength of 15-20 persons, as per the plea raised by the defence, all the accused persons could not have escaped unhurt. There is not even a scratch worth the name on the person of any of the accused, when according to the accused complainant's side were armed with sickles and even with guns. If the complainant's side had been armed with guns and sickles and if they were about 20 in number as alleged, it is difficult to believe that none of the accused would have been hurt at the time of the incident and the accused could have held 4-5 persons captive till the police arrived at the scene after a period of 3-4 hours. As it is, previously there was some feud between accused no.1 and Ganpat Poyrekar. The complainant and Ganpat Poyrekar were passing from the path near the house of accused no.1. That time accused no.1 questioned them why they were passing from his wadi and, therefore, there was exchange of words between accused no.1 and Ganpat. That time accused no.1 along with other accused, who are his own relations, had assaulted the complainant and Ganpat. It is important to note that Ganpat Poyrekar, who was having feud previously with accused no.1, was assaulted first by accused no.1. Accused

no.8 has stated in his 313 statement that there was exchange of words between the two sides at the time of incident. The prosecution witnesses have also deposed that accused no.1 had questioned Ganpat Poyrekar, since deceased, as to why they were passing from the path way which passes from near the house of accused no.1. That path was adopted by the complainant and his companions because it was a shortcut to return to their village Kavathi. When there was quarrel or exchange of words between the two sides due to accused no.1 questioning the complainant's side why they were passing from that path way, the accused persons assaulted the injured persons and then realising that the injured persons would lodge complaint with the police against them, the accused persons tried to be over smart by detaining the injured persons and their companions and sent for the police to create impression on the police that the complainant's side was aggressor. The spot panchanama Exh. 22 shows that the blood was spread over the place near the path way and in the courtyard of the house of accused no.1. This means that the injured were assaulted on the path way and thereafter forcibly taken to the courtyard of the house of accused no.1. If the complainant's side or the injured had been the aggressors and if they had gone to that place with intention to kill accused

no.1, as is the defence case, the assault would have taken place in the courtyard of the house of accused no.1 or in the house of accused no.1, in which case blood would not have been found on the path way, which surely indicates that it was the accused persons who were the aggressors and had gone on the path way to assault the injured persons objecting to their using that path way for returning to their village. It is also significant to note that the accused had not even lodged any complaint to the police against the prosecution witnesses. The non filing of the complaint by the accused also goes to show that it was they who were the aggressors and had assaulted the prosecution witnesses.

10. The I.O. has also seized under panchanama Exh.23 two sickles from the house of accused no.1. Though both the sickles were having blood stains as per the panchanama of seizure, the C.A. report shows that human blood was found on one sickle which was recovered from the house of the accused no.1. Similarly, human blood was found on the earth collected from the path way and blood of group "AB" was found on the dried leaves which were seized from the path way under spot panchanama. The blood of Ganpat Poyrekar is shown to be of "AB" group as per

the C.A. report Exh.17. Thus the finding of the blood on the path way near the house of accused no.1 clearly indicates that the accused were the aggressors who had gone on the path way to assault the two injured because they were passing through that path way. If the complainant's side had been aggressors they would have gone to assault accused no.1 to his house or at least in his courtyard and assaulted him. The absence of any injury on the person of any of the accused, including accused no.1, can leave no doubt that it was the accused persons who were the aggressors. If these aspects had been taken into consideration by the trial court, the trial court would not have given benefit of doubt to the accused persons for not examining or bringing on record the statements of Anil Khadekar and Vilas Pednekar. Nothing prevented the defence to examine them to show what was their complaint or what were the contents of their statements made to the police. The defence itself was hesitant to examine them though they were their men because they must be aware that there was nothing concrete in their statements which could have turned the tables against the prosecution witnesses. And if they had been examined as defence witnesses their statements would have been used to contradict them.

11. Thus the trial court, without considering the important material on record, has simply given benefit to the accused on the ground that the prosecution had not brought on record the statements of the aforesaid two persons. The evidence of the prosecution witnesses clearly goes to show, in the context of the material and circumstances on record, that the accused were aggressors and they had assaulted the complainant and Ganpat Poyrekar with sickles belonging to them. The assault had taken place initially on the path way from where the prosecution witnesses were passing and thereafter they were dragged into courtyard of the house of accused no.1 and kept there till the police arrived on the scene to create impression that they had gone there to assault the accused.

12. The next question is as to what offence is committed and by which of the accused persons. The witnesses have attributed assault with sickles to accused nos.1 and 2. It is accused no.1 who had the motive to assault, particularly, Ganpat Poyrekar. The prosecution witnesses have vaguely stated that after the two injured fell down because of the assault made on them by accused nos.1 and 2 with sickles, the accused nos.3 to 8 assaulted them with sticks in their

hands. PW 2 Tukaram had received one injury which is incised wound on his skull. Ganpat Poyrekar had received CLWs on his left side neck, thigh and calf. Those injuries, according to the doctor, were possible due to the use of sickles, Article Nos.7 and 8. It would be, therefore, not possible to hold accused nos.3 to 8 responsible for the assault on these two injured persons. As per the medical evidence PW 2 Tukaram had received simple injury on his head. Though the charge was framed against the accused for offence under Section 307 of IPC it cannot be said that there was attempt to murder on the part of the accused persons. The injuries suffered by Ganpat Poyrekar were not so serious that they were likely to result in his death. If they had wanted to murder them nothing would have prevented them because after they suffered those injuries the two injured had fallen down and the accused had taken them into their custody and kept in the courtyard of the house of accused no.1. If the accused had so wanted or wished or intended, nothing could have prevented them to murder the two injured persons and, therefore, it cannot be said that the act of the accused was done with intention or knowledge and that their act would have caused death of any of these two injured persons. The injuries suffered by both the injured are simple.

Therefore, application of Section 307 of IPC is out of question.

13. PW 2 Tukaram had suffered a simple injury which was caused by use of sickle and, therefore, the offence that was committed in respect of injury to PW 2 Tukaram was under Section 324 of IPC. The fracture, as per the medical evidence, suffered by Ganpat Poyrekar is stated to be Palpalable fracture and would be grievous hurt if confirmed. There is no evidence led by the prosecution to confirm that the injury suffered by Ganpat Poyrekar had resulted in fracture and, therefore, accused nos.1 and 2 would be guilty only of offence under Section 324 of IPC. Since both the accused were in custody for a period of more than two months as under trial prisoners and there is passage of more than thirteen and half years' period from the date of the offence, we feel that the ends of justice would be met if the accused nos.1 and 2 are convicted for offence under Section 324 read with Section 34 of IPC and sentenced to imprisonment already undergone and to pay a fine of Rs.5000/- each. Since we are holding accused nos.1 and 2 as guilty for having assaulted two injured persons, there is no question of convicting any of the accused persons for offences under Sections 147, 148, 307 and application

of Section 149 of IPC.

14. In the result, we partly allow the appeal. The order of acquittal of Respondent Nos.3 to 8 - Original Accused Nos.3 to 8 in respect of all the offences is confirmed. The bail bonds of respondent nos.3 to 8 shall stand cancelled. The order of acquittal of respondent nos.1 and 2 - original accused nos.1 and 2 in respect of offences under Sections 147, 148 and 307 read with Section 149 of IPC is also confirmed.

We, however, convict respondent Nos.1 and 2 - original accused nos.1 and 2 for offence under Section 324 read with Section 34 of IPC and sentence them to imprisonment already undergone and to pay a fine of Rs.5000/- each in default to undergo RI for three months. On the request of Mr. Walawalkar the respondent nos.1 and 2 are given time of six weeks from today to pay the amount of fine in the trial court. The bail bonds of respondent nos.1 and 2 shall be cancelled only after the payment of fine amount within six weeks from today.

(S.S. Parkar, J.)

(S.R. Sathe,J.)